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No. 76-72

In the Supreme Court of the United States

OCTOBER TERM, 1976

JERRY MICHAEL SOLIMINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

Petitioner urges that the government failed to disclose the terms of a negotiated guilty plea with a government witness and that an examination of unopened cartons in a warehouse, with the consent of the owner of the warehouse, constituted an unreasonable search. Petitioner also contends, for the first time, that he was improperly convicted of stealing and receiving the same property.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner and two co-defendants were convicted of conspiracy (Count I), in violation of 18 U.S.C. 371, theft from an

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interstate shipment, and receiving and possessing goods stolen from an interstate shipment (Counts II and III), both in violation of 18 U.S.C. 659 and 2.[1] Petitioner was sentenced to imprisonment for five years on the first count and ten years on the second and third counts, all sentences to be concurrent and subject to the early parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed in an opinion upon which we largely rely (Pet. App.).

The facts are set forth in the opinion of the court of appeals (Pet. App. 2–3). They show that William Skirvin, a driver for Roadway Express, stole a tractor trailer containing Levi Strauss products from the terminal of his employer in Cincinnati, Ohio. Skirvin acted in concert with petitioner, to whom he was indebted, and defendant Sclafani, who was to "fence" the stolen property. Skirvin unloaded the contents of the trailer at a Cincinnati warehouse where petitioner had made storage arrangements.

On the following day, the manager of the warehouse heard a news broadcast about the hijacking of a railway express truck. He called his brother, the owner of the warehouse, and the Federal Bureau of Investigation. Two days later an FBI agent, with the consent of the warehouse owner, inspected but did not open the cartons, which were stored in an open area. The FBI kept the warehouse under surveillance

[1] The court directed a judgment of acquittal for a fourth defendant.

and, after certain of the defendants attempted to remove the cartons, Skirvin was arrested. He agreed to cooperate with the government and pleaded guilty to a misdemeanor offense.

1. The court of appeals correctly rejected (Pet. App. 10) petitioner's contention, reiterated in his petition (Pet. 5–6), that the government concealed the terms of a plea bargain with Skirvin. The court noted that "the jurors were accurately informed that Skirvin had not yet been sentenced and that the government had made no promises to him with respect to sentencing" (Pet. App. 10). Although petitioner complains (Pet. 6) that Skirvin allegedly did not know whether criminal charges remained pending against him after his plea to the misdemeanor charge, he makes no showing that any possible misunderstanding was deliberately induced or in any way influenced Skirvin's testimony. Moreover, as the court of appeals noted (Pet. App. 10), "the district court ruled as a matter of law Skirvin's plea to the misdemeanor charge had terminated the felony charge in question."

2. The court of appeals also held correctly that petitioner's Fourth Amendment rights were not violated when an FBI agent viewed the unopened stolen cartons on the floor of the warehouse with the consent of the warehouse manager, who had full authority over the premises. Under the circumstances, petitioner had no reasonable expectation of privacy or exclusive use of the premises. See *United States* v. *Mat-*

lock, 415 U.S. 164; *United States* v. *Novello*, 519 F. 2d 1078 (C.A. 5); *United States* v. *Piet*, 498 F. 2d 178 (C.A. 7), certiorari denied, 419 U.S. 1069.[2]

3. Petitioner also contends (Pet. 7–8) that he cannot be punished, even by concurrent sentences, for both theft and possession and receipt of stolen goods. This contention was not raised below and, accordingly, would not ordinarily warrant review by this Court. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147, n. 2. In *United States* v. *Gaddis*, 424 U.S. 544, however, this Court held that a defendant may not properly stand convicted and sentenced under 18 U.S.C. 2113 for both bank robbery and possession of the proceeds of the robbery. The Court ruled that, where the jury convicts on both charges, the district court should impose only a single sentence for the more serious count. We believe the same principle applies in this case. We note that, in recognition of this principle, the court of appeals vacated the possession and receipt conviction of petitioner's co-defendant, who had been charged with identical crimes and given an identical sentence (Pet. App. 3, 10–14).

While the failure of petitioner to raise this issue in the court of appeals, where it was raised by his co-

[2] By contrast, *Chapman* v. *United States*, 365 U.S. 610, and *Stoner* v. *California*, 376 U.S. 483, on which petitioner relies (Pet. 7), involved searches of a private house and a hotel room, respectively, premises which the defendants in those cases arguably could expect were committed to their private use.

defendant, would fully justify this Court in denying the petition for certiorari, the United States does not oppose a grant of the petition for the limited purpose of remanding the case to the district court to vacate the sentence imposed for possession and receipt. In all other respects, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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